Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd

HIGH COURT (PULAU PINANG) — ORIGINATING MOTION NO 24–509 OF 1998
JEFFREY TAN J
24 AUGUST 1999

Civil Procedure *— Injunction — Marewa injunction — Application for — Principles applicable — Good arguable case — Risk that defendant may deal with assets — Counterclaim by defendant — Whether court should deduct counterclaim from plaintiff's claim and only grant injunction for balance — Whether insolvency per se is sufficient reason to grant injunction — Whether transfer of assets by defendant was normal conveyancing practice — Whether transfers were device to deny plaintiff of fruits of award*

The plaintiff entered into a contract with the defendant whereby the plaintiff agreed to carry out and complete certain external infrastructural works for the defendant. Several certificates for payment were issued to the plaintiff for work completed by them. Dispute then arose between the parties which were subsequently referred to arbitration. The plaintiff made an application for a Mareva injunction against the defendant to assist the arbitration proceeding. It was contended that: (i) the plaintiff had a good and arguable claim against the defendant; (ii) the defendant was insolvent; and (iii) there was a risk of dissipation of the defendant's assets. It was submitted that recently the defendant dissipated three properties to a RM3 company, owned and controlled by a director of the defendant. The defendant conceded that the plaintiff had an arguable case on the unpaid certificate but contended that some of the plaintiff's claims were debatable. Further, it was submitted that the defendant had a counterclaim against the plaintiff and thus the court should deduct the counterclaim from the plaintiff's claim and only grant a Mareva injunction for the balance.

Held, allowing the application:

(1) The claim and counterclaim would be adjudged on its merits by the arbitrator. This litis contestatio was only to settle the issue of the interim preservation of some of the assets of the defendant pending the award of the arbitrator. The Mareva injunction should be granted to the plaintiff if it appears that the plaintiff has a good arguable case and that there is a risk that the defendant may deal with its assets within the jurisdiction as to render them unavailable or untraceable to satisfy any award that the plaintiff may obtain against the defendant (see p 230A–C).

(2) A Mareva sum computed on the balance of two competing claims would not remove the risk that a judgment or award in the plaintiff's favour would remain unsatisfied because of the defendant's dissipation of assets. Where it was not clear and obvious that the counterclaim will succeed, the Mareva sum should not be reduced, as a reduction will leave the plaintiff

exposed still to the risk that a judgment or award in his favour would remain unsatisfied because of the defendant's dissipation of assets not frozen by the reduction of the Mareva sum (see p 231G–I).

(3) The insolvency occasioned or would be occasioned by the disposal of assets evinced a real risk that the defendant would cheat the plaintiff of the proceeds of an action. But insolvency per se is not a sufficient reason to grant a Mareva injunction. Only a real risk that a judgment of award would remain unsatisfied because of the dissipation of assets warrants the grant of a Mareva injunction (see p 236F–G).

(4) The recent transfers of the assets of the defendant showed out clearly that the defendant was most probably dealing with or disposing of its assets in such a manner as to render them unavailable when the award was given against them, to frustrate any execution under the award. Although the defendant demonstrated that those transfers were a normal sale, the payment of the sale consideration only a month after registration of title is not normal conveyancing practice. The transfer of title to a RM3 company without the prior receipt of the sale consideration payment was not prudent conveyancing practice. Furthermore, a RM3 company would probably not have the resources to pay RM600,000. Those transfers were questionable and most unlikely to have been a normal sale. Undoubtedly, there was more than a probable case that those transfers were a device to deny the plaintiff of the fruits of any award in favour of the plaintiff. No further doubt in favour of the defendant could be ascribed. On the evidence, the probity of the defendant could not be relied on. A refusal of Mareva injunction would involve a real risk that an award in the plaintiff's favour would remain unsatisfied (see p 237A–G).

[Bahasa Malaysia summary

Plaintif telah memasuki suatu kontrak dengan defendan di mana plaintif telah bersetuju untuk melaksanakan dan menyiapkan beberapa kerja-kerja infrastruktur luaran untuk defendan. Beberapa sijil untuk pembayaran telah dikeluarkan kepada plaintif untuk kerja yang yang disiapkan oleh mereka. Pertikaian timbul antara pihak-pihak yang kemudiannya dirujuk kepada penimbang tara. Plaintif telah membuat permohonan untuk injunksi Mareva terhadap defendan untuk membantu prosiding timbang tara. Adalah dihujahkan bahawa: (i) plaintif mempunyai tuntutan yang boleh dihujahkan dan baik terhadap defendan; (ii) defendan adalah tidak solven; dan (iii) terdapat risiko aset-aset defendan dilupuskan. Adalah dihujahkan bahawa baru-baru ini defendan telah melupuskan tiga hartanah kepada syarikat bermodal RM3, yang dimiliki dan dikawal oleh seorang pengarah defendan. Defendan mengaku bahawa plaintif mempunyai kes yang boleh dihujahkan berdasarkan sijil-sijil yang

belum dibayar tetapi menegaskan bahawa beberapa tuntutan plaintif boleh dipertikaikan. Selanjutnya, adalah juga dihujahkan bahawa defendan mempunyai tuntutan balas terhadap plaintif dan oleh sebab itu mahkamah patut mengurangkan tuntutan balas tersebut daripada tuntutan plaintif dan hanya memberikan injunksi Mareva untuk bakinya.

Diputuskan, membenarkan permohonan tersebut:

(1) Tuntutan tersebut dan tuntutan balas akan dihakimi berdasarkan merit oleh penimbang tara. Litis contestatio ini hanya untuk menyelesaikan isu pengekalan sementara beberapa aset defendan sebelum award penimbang tara. Injunksi Mareva patut diberikan kepada plaintif jika dilihat bahawa plaintif mempunyai kes baik untuk dihujahkan dan bahawa terdapat risiko bahawa defendan mungkin menguruskan aset-asetnya di dalam bidang kuasa menyebabkan ia tiada atau tidak dapat dikesan untuk memuaskan sebarang award yang plaintif boleh perolehi terhadap defendan (lihat ms 230A–C).

(2) Suatu jumlah Mareva yang dikira berdasarkan baki dua tuntutan yang bertentangan tidak akan mengketepikan risiko bahawa penghakiman atau award yang memihak kepada plaintif akan kekal tidak dipuaskan kerana defendan telah melupuskan aset-aset. Apabila adalah tidak jelas dan ketara bahawa tuntutan balas tersebut akan berjaya, jumlah Mareva tersebut tidak patut dikurangkan, oleh kerana suatu pengurangan akan menyebabkan plaintif terdedah kepada risiko bahawa penghakiman atau award yang berpihak kepadanya akan kekal tidak dipuaskan oleh kerana pelupusan hartanah defendan yang tidak dibekukan oleh pengurangan jumlah Mareva (lihat ms 231G–I).

(3) Ketidaksolven yang timbul atau akan timbul daripada pelupusan aset-aset menunjukkan suatu risiko sebenar bahawa defendan akan menipu plaintif berkenaan dengan award sesuatu tindakan. Tetapi ketidaksolven semata-mata bukanlah sebab yang mencukupi untuk membenarkan injunksi Mareva. Hanya suatu risiko sebenar bahawa suatu award penghakiman akan kekal tidak dipuaskan oleh kerana pelupusan aset-aset mewajarkan pemberian injunksi mareva (lihat ms 236F–G).

(4) Pindahan-pindahan yang terbaru aset-aset defendan menunjukkan dengan jelas bahawa defendan berkemungkinan besar menguruskan atau melupuskan aset-asetnya dalam cara di mana akan menjadikannya tidak boleh direlisasikan apabila award diberikan terhadap mereka, untuk mengecewakan sebarang pelaksanaan di bawah award tersebut. Walaupun defendan menunjukkan bahawa pindahan-pindahan tersebut adalah jualan biasa, pembayaran balasan jualan hanya sebulan selepas pendaftaran hak milik adalah bukan amalan pemindahakan yang biasa. Pemindahan hak milik kepada sebuah syarikat bermodal RM3 tanpa menerima pembayaran balasan untuk jualan dulu

bukanlah amalan pemindahakan yang bijak. Malah suatu syarikat bermodal RM3 kemungkinan tidak akan mempunyai sumber untuk membayar RM600,000. Pemindahan tersebut boleh dipersoalkan dan besar kemungkinan bukanlah jualan biasa. Tanpa keraguan, sememangnya terdapat kes yang kukuh bahawa pindahan-pindahan tersebut adalah hanya suatu alat untuk menidakkan plaintif akan hasil award yang berpihak kepada plaintif. Tiada keraguan selanjutnya yang boleh dianggapkan kepada defendan. Berdasarkan keterangan, kejujuran defendan tidak boleh diharapkan. Suatu penolakan injunksi Mareva akan melibatkan risiko sebenar bahawa award yang berpihak kepada plaintif akan kekal tidak dipuaskan (lihat ms 237A–G).]

Notes

For cases on Mareva injunction, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2255–2309.

Cases referred to

Ace King Pte Ltd v Circus Americano Ltd & Ors [1985] 2 MLJ 75 (refd)
AJ Bekhor & Co Ltd v Bilton [1981] 2 All ER 577 (refd)
Amixo Asia Pte Ltd v Bank Negara Indonesia 1946 [1992] 1 SLR 703 (refd)
Ang Chee Huat v Engelbach Thomas Joseph [1995] 2 MLJ 83 (refd)
Art Trend Ltd v Blue Dolphin (Pte Ltd [1983] 1 MLJ 25 (refd)
Aspatra Sdn Bhd & Ors v Bank Bumiputra (M) Bhd & Anor [1988] 1 MLJ 97 (refd)
Avant Petroleum Inc v Gatoil Overdeas Inc [1986] 2 Lloyd's Rep 236 (refd)
Barclay-Johnson v Yuill [1980] 3 All ER 190 (refd)
Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor [1998] 4 AMR 3377 (refd)
Chai Chup Seng Realty Sdn Bhd v Choo Hua Sang [1997] 2 CLJ 838 (refd)
Creative Furnishing Sdn Bhd v Wong Koi [1989] 2 MLJ 153 (refd)
Cretanor Maritime Management Ltd v Irish Maritime Management Ltd [1978] 1 Lloyd's Rep 425 (refd)
European Grain & Shipping Ltd v Compania Naviera Euro-Asia SA & Ors [1990] 2 MLJ 291 (refd)
Kwong Fook Seng Co v Yee Hoong Loong Corp Sdn Bhd [1990] 1 MLJ 163 (refd)
Lien Hoe Sawmill Co Sdn Bhd v Yap Sing Hock & Ors [1992] 2 CLJ 1022 (refd)
Motor Sport International Ltd & Ors v Delcont (M) Sdn Bhd [1996] 5 MLJ 51 (refd)
Ninemia Maritime Corp v Trave Schiffahrtgesellschaft mbH & Co KG The Niedersachsen [1984] 1 All ER 398 (refd)
Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (UK) Ltd [1984] 1 WLR 1097 (refd)

Pacific Centre Sdn Bhd v United Engineers (M) Bhd [1984] 2 MLJ 143 (refd)

PCW (Underwriting Agencies) Ltd v Dixon & Anor [1983] 2 All ER 158 (refd)

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57 (refd)

Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd [1988] 2 MLJ 261 (refd)

S & F International v Trans-con Engineering Sdn Bhd [1985] 1 MLJ 62 (refd)

Seema Development Sdn Bhd v Mah Kim Chye [1998] 1 CLJ 174 (refd)

Third Chandris Shipping Corporation & Ors v Unimarine SA [1979] 2 AllER 972 (refd)

Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd [1982] 1 MLJ 40 (refd)

Legislation referred to

Rules of the High Court 1980 O 41 r 1(1)

Karin Lim Ai Ching (*Lim Hock Siang* with her) (*Presgrave & Matthews*) for the plaintiff.

Navaratnam Ponompalam (*Parameswaran* with him) (*Loo, Siva & Param*) for the defendant.

Cur Adv Vult

Jeffrey Tan J: Overtaken by events, this is, or this has become, the plaintiff's application, by originating summons dated 1 June 1998 (encl 3), for the following Mareva injunction, and following ancillary order:

(a) Bahawa defendan ditahan dan satu injunksi dikeluarkan untuk menahan mereka sehingga perintah selanjutnya samada oleh mereka sendiri, pengkhidmat mereka atau agen mereka atau dalam hal lain bagaimanapun dari:

(i) melupus, menggadai-janji, menyerahak, menggadai, membebankan, mengambil keluar dari bidang kuasa atau dalam hal lain mengurus bagaimanapun mana-mana aset mereka yang ada dalam bidangkuasa ini sehingga tamatnya prosiding timbangtara nilai-nilai tanpa bebanan aset-aset tersebut melebihi RM2.5 juta.

(b) Bahawa defendan diperintahkan untuk bersumpah dan menyerahkan kepada peguamcara plaintif atau afidavit oleh Pengarah defendan mendedahkan jenis, lokasi dan nilai semua aset-aset mereka dalam bidangkuasa termasuk tanpa memprejudiskan kata-kata umum sebelum ini (dalam jangka masa tujuh hari perintah ini atau mana-mana masa yang diperintahkan oleh mahkamah).

(i) identiti semua bank atau akaun-akaun lain samada di bawah nama defendan sendiri atau dipegang bersama atau dipegang oleh penama-penama atau dalam hal lain atau bagaimanapun bagi pihak defendan dan jumlah wang yang sedia ada di dalam akaun-akaun tersebut.

On the background facts, by a contract ('the contract') dated 1 June 1994 (made up of articles of agreement, and schedule of conditions of building contract — see encl 1, exh CCH 1), the defendant engaged whilst the plaintiff agreed, for the consideration set out in the contract, to carry out and complete the architectural, mechanical, electrical, and external infrastructural works for 157 units of two storey shophouse and office at Pekan Kelang Lama, Mukim Padang Cina, Daerah Kulim, Negeri Kedah Darulaman ('the said works'). Several certificates for payment, amongst which, certificates for payment 18, 19, 20, 21 and 22, were issued by the architect in charge of the said works (Messrs Arkitek KH Chew) to the plaintiff for work completed by the plaintiff.

Meantime, or thereabouts, disputes had arisen between the parties. On 21 July 1997, pursuant to cl 30(4)(a) of the conditions of contract, the plaintiff called upon the defendant to concur on the appointment of an arbitrator to resolve various differences and disputes, and on 3 October 1997, the president of Persatuan Arkitek Malaysia appointed one Sundra Rajoo as arbitrator to resolve the following disputes between the plaintiff and defendant:

(a) the defendant's alleged failure and or refusal to pay certificates 18, 19, 20, 21 and 22;

(b) the defendant's alleged imposition and deduction of RM1,257,000 as liquidated and ascertained damages;

(c) the plaintiff's claim of RM740,000 for the alleged late payments by the defendant and for alleged increased cost of materials and goods;

(d) the defendant's alleged failure or refusal to pay RM671,927.50 for additional works; and

(e) the plaintiff's claim for certificate for payment 23 for RM207,108.55 that the defendant allegedly withheld, and the plaintiff's claim for RM294,915 for direct loss and or expenses occasioned by the postponement of the works on 12 September 1997. (According to court documents, the plaintiff and defendant have respectively submitted their points of claim and defence & counter-claim to the arbitrator).

Enclosure 3 was first called up for hearing on 29 June 1998, but was adjourned at the request of the plaintiff to 20 July 1998. Meanwhile, on 7 July 1998, before encl 3 could be argued, the defendant applied, coincidentally to this court vide encl 3 in Penang High Court No 24–670–1998 (670), for the following orders:

(a) to cancel the appointment of Sundra Rajoo as arbitrator in the matter of the arbitration between the plaintiff and defendant;

(b) to appoint a new arbitrator in place of Sundra Rajoo; and

(c) to restrain the said Sundra Rajoo (cited as the second defendant in 24–670–1998) from proceeding with the said arbitration.

In 670, the defendant too applied and obtained, on 7 July 1998, an ex parte injunction restraining the said Sundra Rajoo from proceeding with the said

arbitration, until 21 July 1998 or until further order, whichever is earlier; encl 3 in 670 was fixed for inter partes hearing on 17 July 1998 and then on 20 July 1998. Hence, both proceedings (509 and 670) got to be called up together on 20 July 1998, and henceforth, from 14 August 1998, were always called up together.

In the interim, on 20 July 1998, when encl 3 (509) was next called for hearing, Ms Karin Lim (for the plaintiff/applicant) and Mr Annamalai (counsel then for the defendant/respondent) informed the court that the parties had agreed that the defendant would deposit the entire retention sum (being RM575,000 deducted from various certificates for payment) with Messrs Presgrave & Mathews and Messrs Annamalai & Co as stakeholders with instructions to release the retention sum to the party successful at the arbitration. Hence on 25 July 1998, Ms Lim informed the court that the plaintiff would be pursuing only for prayers 5, 6 and 7 of encl 3 (509).

But hearing of the remaining prayers of encl 3 (509) was not expedited, for hearing of encl 3 (509) was severely disrupted by a Teutonic event and then only resumed after a long hiatus. Ms Lim first argued the plaintiff's application on 20 July 1998. She continued her submission on 25 July 1998 and 8 August 1998. She was to continue her submission on 29 August 1998. But then occurred the Teutonic event, for on 28 August 1998, this court was served by the defendant (509) an order dated 27 August 1998 (issued by the High Court at Shah Alam in Suit No 22–1075–98) staying and restraining the further conduct of 509 until the disposal of Shah Alam Suit No 22–1075–98, whilst the judge of the court, for he was not spared, was demanded of by the defendant (509), by notice dated 27 August 1998 of Mahadevi Nadchatiram & Partners, Advocates & Solicitors, to comply with the order dated 27 August 1998 of the High Court at Shah Alam.

Perhaps even without doubt, that order dated 27 August 1998, especially the jurisdiction to make that order, with respect to that court of concurrent jurisdiction, is utterly questionable. But Ms Lim would not continue her submission on 29 August 1998, probably because of her apprehension that she could be cited for contempt by that court if she continued her submission. Still, it resulted in the enforced suspension of the hearing of encl 3 (509). In the event, hearing of encl 3 (509) [could] only resumed on 16 June 1999, after the Court of Appeal on 3 May 1999 had set aside the order dated 27 August 1998 and struck out Shah Alam High Court Civil Suit 22–1075–98, and after the Federal Court on 10 June 1999 had dismissed the defendant's motion for leave to appeal against the decision of the Court of Appeal of 3 May 1999. Meantime, arising from the service of the order dated 27 August 1998 on the court and the notice dated 27 August 1998 to the judge, the court initiated contempt proceedings against the defendant (509), Khor Kok Thye and Mahadevi Nadchatiram, an Advocate & Solicitor. With regard to those contempt proceedings, both the defendant (509) and Khor Kok Thye were convicted and fined (RM10,000 each) whilst no order of committal was recorded against Mahadevi Nadchatiram.

With regard to Shah Alam 22–1075–98:

(i) on 17 September 1998, the plaintiff applied to the High Court at Shah Alam to strike out Shah Alam 22–1075–98.

(ii) on 22 October 1998, the High Court at Shah Alam dismissed the plaintiff's application.

(iii) on 26 October 1998, the plaintiff appealed to the Court of Appeal against that decision of the High Court at Shah Alam of 22 October 1998.

(iv) on 30 October 1998, the plaintiff applied to the High Court at Shah Alam for a stay of Shah Alam 22–1075–98 until the disposal of their appeal to the Court of Appeal.

(v) on 21 December 1998, the defendant filed an action at the High Court at Shah Alam (Civil Suit 22–1628–98) to strike out a consent order dated 20 June 1998 of this court.

(vi) on 9 February 1999, the High Court at Shah Alam dismissed the plaintiff's application for a stay of Shah Alam 22–1075–98.

(vii) on 12 February 1999, the plaintiff applied to the Court of Appeal for a stay of Shah Alam 22–1075–98.

(viii) on 26 March 1999, YAA Chief Judge of Malaya ordered that Shah Alam 22–1628–98 be heard by the High Court at Penang;

(ix) on 5 April 1999, the defendant applied to the High Court at Shah Alam for leave to amend the statement of claim and for leave to enter summary judgment;

(x) on 15 April 1999, the High Court at Shah Alam issued an order restraining ... and ordering the plaintiff to furnish information of its assets and banking accounts;

(xi) on 22 April 1999, the Court of Appeal ordered a stay of Shah Alam 22–1075–98;

(xii) on 3 May 1999, allowing the plaintiff's appeal and furthermore ordering costs and damages against the defendant, the Court of Appeal struck out Shah Alam 22–1075–98 in its entirety and set aside all injunctions issued in Shah Alam 22–1075–98; and finally

(xiii) on 10 June 1999, the Federal Court dismissed the defendant's motion for stay of the decision of the Court of Appeal of 3 May 1999, with costs (see encl 27).

But before turning to the instant encl 3, one matter too ought to be related. When 509 and 670 were called up for hearing of the respective encl 3 (509) and encl 3 (670) on 22 June 1999, having been adjourned from 16 June 1999 at the request of Mr Parameswaran for Monatech (M) Sdn Bhd, Miss Lim and Mr Navaratnam (counsel then for Monatech (M) Sdn Bhd informed the court that the parties had fully settled 670. The following consent order was recorded:

(a) all proceedings pleaded in the matter of an arbitration between Jasa Keramat Sdn Bhd and Monatech (M) Sdn Bhd and all new issues

A arising from the pleaded issue (including the issue of fraud), if any, is to be decided in its entirety by a new arbitrator;

(b) Jasa Keramat Sdn Bhd and Monatech (M) Sdn Bhd appoint Tan Sri Edgar Joseph Jr as the sole arbitrator in place of Sundra Rajoo;

(c) Sundra Rajoo withdraws as arbitrator of the matter in arbitration;

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(d) Monatech (M) Sdn Bhd withdraws all allegations on the impropriety of Sundra Rajoo;

(e) Monatech (M) Sdn Bhd bears the entire cost of already directed hearing dates and out of pocket expenses of Sundra Rajoo in 670;

C (f) all existing orders on costs ordered by Sundra Rajoo as arbitrator stand;

(g) 670 to be discontinued forthwith and that the costs of 670 to be borne by the loser in the matter in arbitration; and

(h) Jasa Keramat Sdn Bhd and Monatech (M) Sdn Bhd are at liberty to D apply further for the appointment of an arbitrator, in the event that Tan Sri Edgar Joseph Jr is not available.

Also, on that day, Mr Navaratnam informed the court that he had been instructed to withdraw Shah Alam Suit No 22–1628–98 (then already directed to be heard by the High Court at Penang); Mr Navaratnam orally E applied to strike out, and so it was struck out, all outstanding applications by Monatech (M) Sdn Bhd in 670 (encls 3, 4 and 24). Hence, after so much drama, the instant encl 3 (509), whence it all ignited, is the only outstanding matter before the court or indeed any court. It is time then to collate the submissions.

F Laying first the foundation, Ms Lim submitted that the Mareva injunction and the ancillary order are to assist the arbitration proceeding. Her oral and written submissions may be paraphrased as follows. The plaintiff has more than a good and arguable claim against the defendant. The balance sum of RM899,826.45 on certificates for payment 18, 19, 20, 21, 22 & 23 (encl 1, exh CCH 2), and the sum of RM671,927.50 for G additional works executed (see encl 1 exh CCH 5), is due and payable by the defendant to the plaintiff. The plaintiff has a total claim of RM4,500,000 against the defendant but is only seeking an injunction restraining the disposal of assets to the aggregate value of RM2.5m.

Besides a good and arguable claim, the plaintiff has to show a risk of dissipation of the defendant's assets. It is sufficient for the plaintiff to show H a risk of disposal of assets which has the effect of frustrating the plaintiff's recovery of the fruits of any judgment that is likely to be obtained by the plaintiff against the defendant. On the risk of the dissipation of the defendant's assets, the probity and conduct of the defendant are relevant. The probity of the defendant is questionable. The defendant had been paid by end-purchasers for work executed by the plaintiff. The defendant I appointed the architect who issued the certificates for payment. Interim certificates confer temporary finality. Yet, the defendant would not pay to the plaintiff. That is bad faith.

The financial position of the defendant is also relevant. The current liabilities of the defendant far exceed its assets. The defendant is technically insolvent. There was an accumulated loss of RM116,946, for the period ended 30 June 1993. All of a sudden, the unaudited draft accounts for 1997 showed a profit of RM53,761. But the plaintiff's claim and collections from end-purchasers were not reflected in the draft accounts, whilst the provision 'profit from uncompleted project of RM646,126' in the unaudited draft accounts for 1997 was put in to give a positive picture of the defendant.

On the defendant's counterclaim (principally for damages for alleged late delivery and to a much lesser extent for rectification works), Miss Lim submitted that the counterclaim is not bona fide. The counterclaim is no reason to refuse the Mareva injunction. Total work was handed over in February 1997. On 25 May 1997, the certificate of practical completion was given. The architect granted an extension of time, to 13 April 1996, for completion of the work. The architect determined that the period of late delivery was from 13 April 1996 to 5 June 1997. In July 1998, after reference to arbitration and in the course of these proceedings, the architect issued a certificate of non-completion. But the architect was functus officio. He could not issue that certificate of non-completion. That certificate of non-completion issued after reference to arbitration is void. Rights must be decided by the arbitrator. In any event, how could the architect have ascertained a delay of 419 days when he had given an extension of time. The extension of time was given on two conditions to be fulfilled. When those conditions were not fulfilled, videlicet, squatters were not evicted from the site and payments were not promptly paid, time became at large. There was no completion date upon which damages for late delivery could be assessed. The counterclaim has no basis. The certificate of non-completion was the result of a conspiracy between the defendant and architect.

The counterclaim for rectification works is also not bona fide. According to condition 15(2) of the contract, the architect must certify the defects and the plaintiff must be given a chance to rectify the certified defects. Only then, could repairs be effected by the defendant. Conditions 15(2) and 22 were not complied. The plaintiff was deprived of a chance to rectify any defects.

Lately, on 4 May 1999, the defendant dissipated (transferred) three properties (building lots 46, 47 & 48 together with buildings thereto) to New Resources Sdn Bhd, a RM3 company. Those transfers were registered on 17 May 1999. But how could a RM3 company have had the resources to pay the stated purchase price of RM600,000? There is no evidence that the purchase price had been paid into the defendant's banking accounts. The redemption sum for those three units has not been disclosed. Buildings were only recently erected on those three lots, and the defendant could not have had those assets (buildings) disposed for more than three years. Khor Ah Bah @ Khor Kok Boon, a director of both defendant company and New Resources, has 100,000 out of 300,000 shares of the defendant company and two out of three shares of New Resources. Those transfers violated s 132 of the Companies Act 1965 and are void. Those transfers were motivated by bad faith. It was a devise to deny the plaintiff of the fruits of

any judgment that might be entered against the defendant. On 3 May 1999, the Court of Appeal struck out Shah Alam Suit No 22–1075–98, set aside all injunctions obtained by the defendant and ordered costs and damages against the defendant. On the very same day, the defendant submitted the transfers for valuation. That was not a coincidence. Contrary to normal conveyancing practice, the balance purchase price for the three lots was payable only after registration of the three lots unto New Resources. Those transfers are questionable. The conduct of the defendant — for example, objecting to the arbitrator, and perpetual delays in payments — are also questionable.

Summing up, Ms Lim said that the plaintiff has more than an arguable case, that the risk of dissipation is evinced by the conduct of the defendant, and that the balance of convenience is in favour of the grant of the injunction.

Mr Navaratnam conceded that the plaintiff has an arguable case on the unpaid certificates. However, he contended that the plaintiff's claim for RM294,000 (for damages for the postponement of the works) and RM740,000 (for escalation costs) are highly debatable. He said, that the stop work order was the result of the plaintiff's fault, that the conditions of tender specified that the tender price was a firm tender price and not subject to price adjustments, that additional costs could not be claimed as the contract was a lump sum contract, and that there is no evidence that new sub-contractors had been engaged. He furthermore said that the claim for variation works had been rejected on 30 July 1997 by the architect and that certificate for payment 23 only approved the payment of RM35,698.80 to the plaintiff. The plaintiff has a good and arguable case only for RM1,223,025.25. However, the defendant has a counterclaim of RM1,526,950. The court should deduct the counterclaim from the plaintiff's claim and only grant a Mareva injunction, if the court is so minded, for the balance. The conduct of the plaintiff is relevant — the plaintiff unilaterally withdrew the performance bond. 'The transfers were wrongly advised', but the defendant 'had done nothing wrong', Mr Navaratnam said.

Miss Lim replied that the performance bond was returned to the plaintiff, to help the plaintiff who was not paid on time, with the consent of the architect and the managing director of the defendant.

The Mareva injunction, now an established feature of Malaysian law (see *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 40, *S & F International v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62 and *Aspatra Sdn Bhd & Ors v Bank Bumiputra (M) Bhd & Anor* [1988] 1 MLJ 97) is 'to prevent the defendant from removing assets ... or from disposing of or dealing with them ... in such a manner in such a way as to frustrate execution under proceedings brought or to be brought by the plaintiff' (*Equitable Remedies* by Spry, 3rd edn p 491), and, 'to prevent a plaintiff being cheated out of the proceeds of an action, should he be successful, by a defendant transferring his assets abroad or dissipating his assets within the jurisdiction' (*S & F International Ltd* at p 64, quoting *PCW (Underwriting Agencies) Ltd v Dixon & Anor* [1983] 2 All ER 158). The

'injunction may be granted to a plaintiff with a proper claim in any case where there are grounds for fearing that the defendant may defeat justice by transferring assets abroad or by concealing them in this country' (*The English Supreme Court Practice* (1997) para 29/1/20). 'It should be granted where it appears likely that the plaintiff will recover judgment against the defendant for a certain or approximate sum and there are reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, wholly or in part, but may deal with them, whether by removal out of the jurisdiction or disposing of them within the jurisdiction as that they are not available or traceable when the judgment is given against them' (The English Supreme Court Practice 1997 para 29/1/21). It may be granted even after judgment, in aid of execution (*Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (UK) Ltd* [1984] 1 WLR 1097; *Seema Development Sdn Bhd v Mah Kim Chye* [1998] 1 CLJ 174). Still, 'the heart and core of the Mareva injunction is the risk of the defendant removing his assets and so stultifying any judgment given by the courts in the action' (*Barclay-Johnson v Yuill* [1980] 3 All ER 190, per Sir Robert Megarry VC).

Accordingly, a plaintiff must show: (i) that there is a good and arguable claim; (ii) that the defendant has assets within the jurisdiction; and (iii) that there is a risk that the defendant may deal with those assets, whether by removal or disposal, as to render them unavailable or untraceable (see *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143 at p 148; see also *Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153 at p 155, *Ace King Pte Ltd v Circus Americano Ltd & Ors* [1985] 2 MLJ 75).

A good and arguable case 'is more than barely capable of serious argument and yet not necessarily one which the judge believe to have a better than fifty-fifty per cent chance of success' (*Ninemia Maritime Corp v Trave Schiffahrtgesellschaft mbH & Co KG The Niedersachsen* [1984] 1 AllER 398, and applied in *Pacific Centre Sdn Bhd*). 'The [plaintiff] need not show that [he] has a case so strong as to warrant summary judgment nor even a strong prima facie case. It would generally be sufficient if the [plaintiff] can show on the evidence available ... there is a fair chance that [he] would obtain judgment ... (*Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor* [1998] 4 MLJ 1; *Chai Chup Seng Realty Sdn Bhd v Choo Hua Sang* [1997] 2 CLJ 838). Unless it is plain that the plaintiff's case cannot succeed, an arguable defence will not displace the plaintiff's good arguable case (*Lien Hoe Sawmill Co Sdn Bhd v Yap Sing Hock & Ors* [1992] 2 CLJ 1022).

There must be a real risk of the assets being dissipated or removed (*Ang Chee Huat v Engelbach Thomas Joseph* [1995] 2 MLJ 83 at p 88). 'There must be solid evidence to establish the risk ... mere refusal to pay a disputed debt ... [falls] far short of the necessary evidence to establish real risk of dissipation of assets ...' (*Creative Furnishing Sdn Bhd* at p 155). The plaintiff must give some grounds for believing that the defendant would remove or dispose of his assets (*Art Trend Ltd v Blue Dolphin (Pte) Ltd* [1983] 1 MLJ 25). 'It is sufficient for the plaintiff to merely show a risk of disposal of assets which has the effect of frustrating the plaintiff in his attempt to recover the fruits of a judgment he is likely to obtain against the defendant' (*Pacific Centre Sdn Bhd* at p 150).

A The test to be applied by the court when deciding to exercise its discretion to grant a Mareva injunction to a plaintiff ... is whether, after the plaintiff has shown that he has a good and arguable case and after considering the whole of the evidence before the court, the refusal of a Mareva injunction would involve a real risk that a judgment or award in the plaintiff's favour would remain unsatisfied because of the defendant's B removal of assets from the jurisdiction or dissipation of assets within the jurisdiction (*Ninemia*). Are there facts from which the court, considering the matter in perspective as a prudent sensible man, can properly infer a danger that the defendant will deal with his assets such that he would have no assets within the jurisdiction to satisfy any judgment debt? (*Third Chandris Shipping Corporation & Ors v Unimarine SA* [1979] 2 All ER 972 at p 987b, C quoted in *Chai Chup Seng* at p 854). In that regard, the conduct and therefore probity of the defendant is eminently relevant (*Ninemia; S & F International; Ang Chee Huat v Engelbach Thomas Joseph* [1995] 2 MLJ 83 at p 88; *Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd* [1988] 2 MLJ 261, *Amixo Asia Pte Ltd v Bank Negara Indonesia 1946* [1992] 1 SLR 703).

D It is incumbent on the applicant to make a frank and full disclosure of all material facts. Every material representation must not be misleading, and there must not be any suppression of material facts ... The remedy of a Mareva injunction must not be abused' (*Creative Furnishing* at p 155) and 'judges exercise a wide discretion ... to see that the [ex parte] procedure is not abused' (*The Third Chandris Case*, quoted with approval in *Creative* E *Furnishing* at p 155). 'It must not be debased into something invoked to obtain security for a judgment in advance, or to [pressurize] a defendant into a settlement. The courts must be vigilant to ensure that a Mareva defendant is not treated like a judgment debtor (see *AJ Bekhor & Co Ltd v Bilton* [1981] 2 All ER 577). It is consequently not accurate to refer to a F Mareva injunction as a pre-trial attachment (see *Cretanor Maritime Management Ltd v Irish Maritime Management Ltd* [1978] 1 Lloyd's Rep 425)' (*Zainal Abidin* at 262). 'The remedy of a Mareva is after all, equitable relief that is granted to ensure that the course of justice is not thwarted. Since equitable considerations are involved, a court should carefully weigh the balance of justice to ensure that any order it makes or any relief it grants G in the exercise of its Mareva jurisdiction is not used as an instrument of oppression' (*Motor Sport International Ltd & Ors v Delcont (M) Sdn Bhd* [1996] 5 MLJ 51). It is not intended to put the plaintiff in the position of a secured creditor (*S & F International* at p 64). A Mareva injunction procured with the motive of obtaining security from the defendant is an abuse of the process of a Mareva injunction (*European Grain & Shipping Ltd* H *v Compania Naviera Euro-Asia SA & Ors* [1990] 2 MLJ 291).

And relevant to this application, as a precedent, the [only] local reported case of a Mareva injunction preserving the status quo pending arbitration is *Kwong Fook Seng Co v Yee Hoong Loong Corp Sdn Bhd* [1993] 1 MLJ 163.

I In the present case, that the defendant has assets within the jurisdiction, and that the plaintiff has a good arguable case, but only on the unpaid certificates, is not in dispute. That the plaintiff has a good arguable case on the rest of its claim is however in serious dispute. And the defendant who is

not content merely arguing that the rest of the plaintiff's claim is not arguable and/or that there is no risk of dissipation of assets has put forward a counterclaim as a 'defence' to the grant and or to the extent of the sought Mareva injunction.

Of course, that claim and counterclaim would be adjudged on its merits by the arbitrator. This *litis contestatio* is only to settle the singular issue of the interim preservation of some of the assets of the defendant pending the award of the arbitrator. And going by settled law, the Mareva injunction should be granted to the plaintiff if it appears that the plaintiff has a good arguable case and that there is a risk that the defendant may deal with its assets within the jurisdiction, whether by removal or disposal, as to render them unavailable or untraceable to satisfy any award that the plaintiff may obtain against the defendant. But yet, according to Mr Navaratnam, that should not be the case. He contended that the defendant's counterclaim (RM1,526,950) should be deducted from the plaintiff's claim, and that any Mareva sum should be limited to the balance. He referred to *The Mareva Injunction and Related Orders* by Mark SW Hoyle at p 70:

> 'In many cases, the possibility exists of reducing the sum frozen by establishing a good arguable counterclaim or set-off. If, for example, a plaintiff obtains a Mareva injunction for £1 million, and the defendant has a good arguable counterclaim for £750,000, why should he not seek to have the Mareva sum reduced to the balance of the two competing claims, that is £250,000? After all, if the same test is applied to both parties, the prima facie claims will have to be judged on the same basis, and it would only be fair and equitable to reduce the sums accordingly.
>
> There is an even stronger case for reducing the Mareva sum where a pure set-off exists, because this is a defence to the claim enjoying a right of being pleaded as such. [O 18 r 17; Supreme Court Act 1981, s 49(2)(a)]
>
> The instances giving rise to a reduction can appear in many ways. For example, a plaintiff suing his agent for the full proceeds of sales could be met by a reduction to take into account commission due, or agreed expenses. There might be a contractual right to deduct money from invoices for late delivery of goods, or a term in a lease for withholding or reducing rent on the failure of the landlord to provide full services to his tenants. Contractual set-offs are straightforward and should cause no problem in an application to vary, especially as the existence of the right is something which should, perhaps, have been disclosed previously. In some cases it must be for the court to assess how the sum sought to be set-off matches in with the plaintiff's claim, For instance, a debtor can generally set off a liquidated sum of his against a liquidated claim by his creditor, even if arising out of separate contracts. If the claim is unliquidated it can be pleaded against a liquidated or unliquidated sum if both arise out of the same or a connected contract.
>
> The defence of set-off can arise in many Mareva cases, and in general it has been accepted in appropriate circumstances, although not as yet in clear terms in any reported cases.'

Mr Navaratnam also referred to *Commercial Litigation: Pre-emptive Remedies* (2nd Ed) at p 172:

> If a plaintiff has a good arguable case for £1 million, can he secure a Mareva if the defendant has a good arguable set-off or counterclaim for say £750,000? Such a problem arose in the unreported case of *Continental Air Lines*

Incorporated v Aviation and Tourist Marketing AG (18 January 1984, Com Ct), which may be taken as authority for the proposition that the court, if it grants a Mareva, will do so only for the balance, per Webster J:

> 'I consider the second question which has to be answered on application of this kind, namely whether there is a real risk that a judgment obtained by the plaintiffs would be unsatisfied if a Mareva injunction is not made, although in the circumstances of this case, that question does not really arise partly because the set-off constitutes, to the extent that it is well-arguable, a security or sufficient security, for the plaintiff's claim and because the defendants, through their counsel, Mr Cullen, have re-offered their undertaking to place $600,000 in a joint account ...'

Both *The Mareva Injunction and Related Orders* at p 70, and *Commercial Litigation: Pre-emptive Remedies* at p 172 propose that the court, if it grants a Mareva injunction, will only do so for the balance of two competing claims. Nonetheless, is that proposition valid?

Going back to basics, a mareva injunction is to remove the risk that a judgment or award in the plaintiff's favour would remain unsatisfied because of the defendant's dissipation or disposal of assets within the jurisdiction (*Ninemia*), or to remove the danger that the defendant will deal with his assets such that he would have no assets within the jurisdiction to satisfy any judgment or award (*The Third Chandris Case*). It means, with a mareva injunction, that a judgment or award in favour of the plaintiff would not remain unsatisfied because of the defendant's dissipation or disposal of assets. But that would not be the case, if the mareva sum is the balance of two competing claims, and if the plaintiff's claim is the only competing claim successful. For the defendant could have dissipated and or disposed of assets not frozen by the mareva sum computed on the balance of two competing. claims, such that the full judgment or award in favour of the plaintiff could remain unsatisfied because of the defendant's dissipation or disposal of assets, albeit the dissipation or disposal of assets not frozen by the mareva sum. Quite clearly, a mareva sum computed on the balance of two competing claims would not remove the risk that a judgment or award in the plaintiff's favour would remain unsatisfied because of the defendant's dissipation or disposal of assets, and would not remove the danger that the defendant will deal with his assets such that he would have no assets within the jurisdiction to fully satisfy the judgment or award in the plaintiff's favour.

A mareva sum computed on the balance of two competing claims is perhaps apt, where it is clear and obvious, at the interlocutory stage, that the counterclaim or set-off will succeed. For it could be argued then, that a reduction of the mareva sum is unlikely to stultify the nett result of the judgment or award. But where it is not clear and obvious that the counterclaim will succeed, the mareva sum should not be reduced, as a reduction will leave the plaintiff exposed still to the risk that a judgment or award in his favour would remain unsatisfied because of the defendant's dissipation or disposal of assets not frozen by the reduction of the mareva sum, and to the danger that the defendant will deal with his assets such that he would have no assets within the jurisdiction to fully satisfy the judgment or award in his favour. And the irony of it all, where the counterclaim

exceeds the claim, a reduction would even wipe away the entire mareva sum, such that the plaintiff who shows a good arguable claim as well as a risk of the dissipation or disposal of assets and therefore is deserving of a mareva injunction would be left still high and dry, undeservedly but nonetheless effectively, without a mareva injunction.

The objective of a mareva injunction is to remove that risk and danger, and that objective would not be achieved if the judgment or award in favour of a plaintiff with a mareva injunction would yet remain unsatisfied, because of the reduction of the mareva sum. With respect, the proposition 'that the court, if it grants a mareva, will do so only for the balance', is not in agreement with mareva principles. A plaintiff who shows a good arguable case as well as a real risk that the defendant may deal with his assets within jurisdiction, whether by removal or disposal, as to render those assets unavailable or untraceable, is entitled to a mareva sum approximating the sum that the plaintiff is likely to recover judgment against the defendant, without deduction, unless it is clear and obvious that the counterclaim will succeed. For after all, the defendant, even if saddled with a mareva sum greater than the eventual judgment sum, would not really be losing anything. His assets when unfrozen would still be with him. He would have the plaintiff's undertaking as to damages. And if he should succeed on his counterclaim, he would be 'paid' from the plaintiff's claim if also successful, or he would have his judgment, the same as any other unsecured but successful claimant without a mareva injunction or other security. Quite unlike the plaintiff who could be totally losing out if the eventual judgment sum is greater than the reduced mareva sum. Surely, on balance, it must be, that the mareva sum should not be reduced by the counterclaim, unless it is clear and obvious that the counterclaim or set-off will succeed (see *Avant Petroleum Inc v Gatoil Overdeas Inc* [1986] 2 Lloyd's Rep 236, where the English Court of Appeal (O'Connor and Neil LJJ) held that the defendant's proposed counterclaim was not sufficiently strong to reduce the plaintiff's prospects of success below the level needed for the maintenance of the injunction).

Under various heads of claim, the plaintiff contends (encl 16 para 12) that it has a total claim of RM4,646,742.75 against the defendant. But what has this plaintiff shown from thick and voluminous affidavits to be deserving of the mareva injunction?

With regard to the claim on unpaid certificates for payment, there is no dispute that certificates 18, 19, 20 and 21 (encl 1 exh CCH 2) were presented to the defendant for payment of RM1,019,438.60, that RM899,826.45 was not paid on those four certificates, that the defendant had retained RM575,000 as the retention sum, and that the architect issued certificate 23, on 23 February 1998, for the payment of RM35,698.80 to the plaintiff. The defendant contends that certain payments were not credited and disputes therefore the accuracy of those certificates. But Mr Navaratnam congenially yielded that the plaintiff has a good arguable case on those unpaid certificates (RM899,826.45), the RM35,698.80 on certificate 23 and the retention sum (RM575,000). Indeed, given the weight of the authorities on payment certificates (particularly *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995]

2 MLJ 57, where the former Supreme Court held that payment certificates have temporary finality and are entitled to immediate payment in full, and that claims of set-off and counterclaim cannot, as a matter of course, be raised in answer to interim certificates) it is beyond argument that the plaintiff has a good arguable case on those unpaid certificates, certificate 23 and retention sum, amounting to RM1,510,525.20.

With regard to the other claims, the plaintiff exhibited, inter alia, (i) a report (encl 34 exh CCH 1); (ii) the signed 'depositions' of Cheah Chin Huat, Leong Yue Choy, Lee It Hock and Tan Keng San (encl 34 exhs CCH 3, CCH 4, CCH 5 and CCH 6 respectively); and (iii) numerous exhibits. That report (encl 34 exh CCH 1) by Paul Chong & Associates of Penang is purportedly a summary of the alleged additional works (the addition of four staircases, the additional costs of fire resistant bricks, the additional costs of BRC Ref 610 on the ground floor, the additional costs of RC Gutters and septic tanks of specifications different from the original item, and the costs of 314 fire extinguishers) and alleged escalation costs (the higher costs of materials). And that report is not wanting on specifics; in it is a detailed breakdown of the alleged additional works together with technical data, and the computation of the additional costs. The four 'depositions' contain statements of facts regarding the several claims of the plaintiff.

The defendant disputes those claims, and the plaintiff must show on the 'evidence available ... there is a fair chance that [it] would obtain 32 judgment ...' (*Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor; Chai Chup Seng Realty Sdn Bhd v Choo Hua Sang*). Startlingly, there is no evidence available to enable the court to evaluate if there is a fair chance that the plaintiff would recover judgment on the additional works, escalation costs, and other claims. Inter alia, the plaintiff produced four lengthy 'depositions' (encl 34 exhs CCH 3, CCH 4, CCH 5 and CCH 6) containing statements of facts to substantiate their claims. But those 'depositions' are not affidavits sworn (O 41 r 1(1) of the RHC) nor affidavits filed as evidence in these proceedings. And those statements in those 'depositions' are not sworn declarations of facts, as are not, for example, the statements of facts in a police report produced in a judicial proceeding. Those 'depositions' are exhibits, produced and exhibited in proof of sworn facts, and not sworn declarations on affidavits. But there are no sworn declarations of facts for those exhibited 'depositions' to substantiate. Indeed, there are no sworn declaration of facts for any of the exhibits of the plaintiff (those concerning the alleged additional works and escalation costs) to substantiate or to prove. The plaintiff, apparently fixated on proving the risk of dissipation and disposal, on answering the charges and counter-charges of the defendant, and on producing exhibit after exhibit, had totally forgotten to swear to facts on those claims. Paragraph 11 of the affidavit of Cheah Chin Huat affirmed on 6 August 1998 (encl 16), reproduced below, illustrates the case:

> The plaintiff's heads of claim pursuant to the arbitration proceedings are as follows:
>
> 11.1 RM187,326.45 in respect of interim certificates No 18 to 22 (interim certificates no 22 being the first moiety of the retention sum);

11.2 RM287,500 in respect of the final retention sum; A

11.3 RM294,915 in respect of the stop work order by Majlis Daerah Kulim;

11.4 RM740,000 in respect of the damages occasioned by the substitution of the sub-contractor;

11.5 RM108,383.60 in respect of the damages occasioned by the substitution of the sub-contractor; B

11.6 RM671,927.50 in respect of variation orders for additional works;

11.7 RM207,180.55 in respect of variation for BWK;

11.8 RM73,825 in respect of wrongful debiting for transportation of cement charges;

C

11.9 RM500,000 in respect of lost investment;

11.10 RM325,684.65 in respect of interests, and,

11.11 RM250,000 in respect of arbitration costs.

Where are the sworn declarations of facts and material allegations on those claims? Sadly, none, except the following two: D

(a) in paras 3 to 10 of affidavit dated 1 June 1998 (encl 2), Cheah Chin Huat swore to facts relating to the contract, to the plaintiff's execution of the work under the contract, to the unpaid certificates and to the unpaid retention sum; and

(b) in para 12 of affidavit dated 6 August 1998 (encl 16) Cheah Chin Huat swore, 'the plaintiff's total claim against the defendant is RM4,646,742.75 of which the plaintiff is asking only RM2.5m representing the undisputed and liquidated sum in respect of the interim certificates and part of the variation orders, escalation costs and the increased costs occasioned by the substitution of the sub-contractor. E F

There are 'pleaded facts' in the plaintiff's points of claim (encl 2 exh CCH 5). There are 'asserted facts' in the four 'depositions'. There are numerous documentary exhibits. There is a thick report on the alleged additional works and escalation costs. But where crucial, there are no material allegations on affidavits — not even the bare minimum, for G example, 'the plaintiff executed additional works, etc, and is due ...', no sworn declarations of facts, and consequently no affidavit evidence, to permit the court to evaluate the prospects of success of claims 11.3 to 11.11. In the result, the plaintiff has not shown, because there is no affidavit evidence, that it has a good arguable case on claims 11.3 to 11.11. The plaintiff has only shown a good arguable case on the unpaid certificates H (RM899,826.45 and RM35,698.80) and the retention sum (RM57,000).

But material to the alleged risk of dissipation or disposal of assets, the plaintiff swore as follows. Although the architect issued the certificate of practical completion in June 1997, the plaintiff completed the said work in February 1997. The defendant failed to honour the payment certificates I within 14 days from the date of issuance. The sum of RM899,826.45 has not been paid on certificates 18 to 22. The defendant failed to deposit the retention sum into a trust account. In July 1997, the disputes between the

parties were referred to arbitration, but the defendant objected to the arbitrator when arbitration was ready. The defendant is insolvent; its current liabilities exceed its current assets. The defendant's financial position is precarious. The defendant has received large sums from the purchasers for work executed on certificates 18–21. Most of the units have been sold. There is a risk that the assets of the defendant would be dissipated. There is a real risk that judgment would remain unsatisfied because of the disposal of property. The defendant has chronic cash flow problems. With the current slow sales, the defendant would face liquidity problems and would not pay the plaintiff if the injunction is not granted. The financial ability of the defendant could not be relied on. There is no proof of solvency. It is speculation that Phase II is worth RM19m. The draft accounts is a sham — the liabilities have not been disclosed and the moneys received have not been accounted for. The defendant sold 100% of Phase I, 'pocketed' all the money and would not pay the plaintiff. There is no way that the fruits of judgment would be satisfied. Most recently, the defendant dissipated three assets — HS (M) 421/96, 422/96, 423/96. Those transfers to New Resources Sdn Bhd are not bona fide. New Resources Sdn Bhd is owned and controlled by Khor Ah Bah @ Khor Kok Boon, a director of the defendant, and Wong Kim Lian, 'a connected person of the defendant'. There is a real risk that assets would be dissipated to defeat whatever judgment or award that the plaintiff may obtain.

But material to the alleged risk of dissipation or disposal of assets, the defendant responded as follows. Rectification works were not effected, despite the several requests of the architect. The defendant executed the rectification work costing RM212,771.70 (encl 15 exh K-50 and K-51) and completed the road (the defendant exhibited an agreement — encl 15 exh K-52). There was a delay of 419 days in the completion of the work. Purchasers' claims for late delivery would amount to RM891,294.70 (encl 6 exh K-19). RM164,250.64 had been paid already to 32 purchasers for late delivery (encl 30 para 11, exh 19). RM126,755.74 is being withheld by purchasers because of defective works. The plaintiff is liable to pay liquidated damages to the defendant for that delay from 13 April 1996 to 5 June 1997. The defendant has a counterclaim of RM1,250,000, for liquidated damages. Work was not completed in February 1997. The certificate of practical completion was issued on 5 June 1997 and the certificates of fitness for occupation were issued on 22 May 1997. The defendant is not insolvent: the defendant's lands acquired in 1996 had not been taken into account; the defendant has 76 housing units worth RM19m under development; only 45% of those houses have been sold. The defendant is solvent, and there is no basis for this application. The defendant is only seeking a proper set-off and completion of the rectification works. The plaintiff's claim is baseless. Except for the firebricks, all other variation works were rejected by the architect. The roof trusses were not executed according to approved plans. The roof trusses were sagging and purchasers' lives were put at risk, and urgent rectification work was executed by the defendant. The claim of the plaintiff that it effected the rectification work is false. The plaintiff is a shell company (only 100 issued shares) and the undertaking as to damages is a worthless undertaking.

There were delays in the payments, as the plaintiff had agreed to grant a RM1m credit to the defendant. But all payments were prompt and even in advance, after the plaintiff demanded for payments, in breach of the agreed credit. The delay in the completion of the work was not due to late payments, but rather due to the plaintiff's failure to follow the work schedule. The sale of three lots from Phase II for RM600,000 was to redeem those lots from the chargee bank and to settle the bridging loan. The sale proceeds were applied to redeem those lots and to settle the bridging loan. The defendant was paying RM11,000 a month towards the loan interest and the sale was to reduce the loan liability. The agreement of sale was executed on 13 April 1999 and the transfers were submitted for adjudication on 27 April 1999. Those three lots were sold in the ordinary course of business, at a price above the valuation of the plaintiff, and prior to the decision of the Court of Appeal. Those lots were developed to be sold and never intended to form the assets of the defendant. It was a business decision to sell those three lots. Khor Ah Bah has relinquished all interest in New Resources Sdn Bhd (see encl 32 exh KKB 7). Khor Ah Bah resigned as a director on 6 April 1999. The plaintiff is conspiring with Leong Yue Choy, (the defendant's former Managing Director) and Wabina Construction & Engineering Sdn Bhd to extort a settlement of the plaintiff's 'wrong and improper claims' and to pre-empt the defendant's claim.

Apparently, both parties regard insolvency as material in an application for a Mareva injunction. The plaintiff touted insolvency and the defendant bought it by answering to the plaintiff's charge of insolvency. With respect, a judgment or award in the event might well be unsatisfied because of the feared insolvency of the defendant. Nonetheless, a Mareva injunction cannot be granted, as it is not granted to remove the risk that a judgment of award would remain unsatisfied because of the impecuniosity of the defendant. It is only granted to remove the risk that a judgment of award would remain unsatisfied because of the dissipation or disposal of assets. Admittedly, the insolvency occasioned or would be occasioned by the disposal of assets evinces a real risk that the defendant would cheat the plaintiff of the proceeds of an action. But insolvency per se is not a sufficient reason to grant a Mareva injunction. Only a real risk that a judgment of award would remain unsatisfied because of the dissipation or disposal of assets warrants the grant of a Mareva injunction.

As said, hearing of this application was severely disrupted by 22–1075–98 and subsequent appeals. Prior to the disruption, the plaintiff's case was built essentially on the refusal of the defendant to honour the payment certificates, the failure to deposit the retention sum into a trust account, the insolvency of the defendant, the bad faith of the defendant, and the poor prospects of a judgment or award being satisfied. Then, the risk that any judgment or award would remain unsatisfied because of the dissipation or disposal of assets was not clear. The failure to honour the payment certificates could have been with some understandable reason, such as the counterclaim. The objection to the arbitrator could not necessarily have been just mala fide. The collateral actions at Shah Alam, even if ill-advised, could have been bona fide. The defendant could have been just difficult.

A However, the recent transfers of the assets of the defendant show out clearly, *acta exteriora indicant interiora secreta*, that the defendant is most probably dealing with or disposing of its assets in such a manner as to render them unavailable when the award is given against them, to frustrate any execution under the award. Perhaps, the plaintiff might have made a meal of the timing of the transfers. That transfers were effected at about the time B of the unfavourable decisions of the Court of Appeal and Federal Court could have been coincidental. But would it also have been a coincidence that the transfers of three valuable assets were to a RM3 company, and to a RM3 company at about the time of the transfers controlled by Khor Ah Bah, a substantial shareholder of the defendant company, at that. The C defendant remonstrated that those transfers were a normal sale. But payment of the sale consideration only a month after registration of title, the term of the sale, is not normal conveyancing practice. The transfer of title to a RM3 company without the prior receipt of the sale consideration payment is not prudent conveyancing or business practice. And how could a RM3 company have had the resources to pay RM600,000? The defendant D explained that the sale was to reduce the loan liability. But that loan liability could have been reduced without the sale: the sale consideration was payable after the registration of title unto the transferee, and the defendant, to effect the prior registration of title unto the transferee, would have to redeem the said lands with its own resources. Going by the terms of the sale, the defendant would have the means to reduce the loan liability from its E own resources, without any sale, since the defendant would have to redeem beforehand the said lands. Nope, those transfers, questionable indeed and probably offending s 132 of the Companies Act 1965, would not have been but for the fact that Khor Ah Bah was a director and a substantial/majority shareholder of both transferor and transferee companies. It is most unlikely F to have been a normal sale. Undoubtedly there is more than a probable case that those transfers were a device, so Miss Lim worded it, to deny the plaintiff of the fruits of any award in favour of the plaintiff. No further doubt in favour of the defendant could be ascribed. On the evidence, the probity of the defendant could not be relied on. A refusal of a Mareva injunction would involve a real risk that an award in the plaintiff's favour would remain G unsatisfied.

Accordingly, on the Mareva sum of RM1,510,525.20, and because RM575,000 has been deposited with Messrs Presgrave & Matthews and Messrs Annamalai & Co, the defendant is hereby restrained by an injunction from dealing with and or disposing of its assets — six H unencumbered building units under Phase II Pekan Kelang Lama, Mukim Padang Cina, Daerah Kulim — in whatever manner until the final disposal of the matter in arbitration, or further order.

Application allowed.

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Reported by Jafisah Jaafar